STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 146357
Court of Appeals No. 300460
Lower Court No. 10-11026-FC

v.

ALAN STARR TROWBRIDGE,
Defendant-Appellant.
_____/

146357(71)
for Spec. Rep't

PLAINTIFF-APPELLEE'S BRIEF ON APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

page

INDEX OF AUTHORITIES

CASES — Page

STATUTES AND COURT RULES

STATEMENT OF JURISDICTION

Defendant adequately states the basis for this Court's jurisdiction under MCR 7.301(A)(2).

Plaintiff agrees that the issue presented involves legal principles of major significance to the state's jurisprudence, but believe that this issue has been resolved. The Plaintiff disagrees with the defendant's interpretation that the Court of Appeals Opinion of 9/25/12 conflicts with *Lafler v Cooper*, 566 US____; 132 SCt 1576 (2012).

COUNTER-STATEMENT OF QUESTION PRESENTED

I. DID DEFENDANT RECEIVE DUE PROCESS WHERE TRIAL COUNSEL WAS INEFFECTIVE IN EXPLAINING THE POSSIBLE PENALTY BUT COUNSEL'S ERROR DID NOT LEAD TO A REASONABLE PROBABILITY THAT THE DEFENDANT WOULD HAVE PLED GUILTY?

Plaintiff answers:	Yes.
Defendant answers:	No.
The Trial Court answered	Yes.
The Court of Appeals answered:	Yes.

COUNTER-STATEMENT OF FACTS

Defendant, Alan Starr Trowbridge, was convicted of three counts of Criminal Sexual Conduct, first degree, contrary to MCLA 750.520b(1)(a), Trial Transcript volume IV, hereinafter, "TIV," 247-248. Prior to trial, Plaintiff offered that Defendant plea to two counts of Criminal Sexual Conduct third degree with a habitual second offense notice. On the morning of trial, Plaintiff offered that Defendant plead No Contest to two counts of Criminal Sexual Conduct third degree without the habitual. This offer was accepted, but the trial court refused to accept the plea agreement as it was made after the final date for taking pleas. Additionally, the plea would have been *no contest*, which the trial court made clear it would not have accepted. Judge's Opinion Transcript, 7/27/2011, hereinafter, "JT," 9.

Following Defendant's conviction, he was asked to provide his description of the offense. Defendant continued to claim his innocence and blamed his conviction on his status as a registered sex offender. He blamed the victim's mother for coaching the victim, and referred to the case as a witch hunt. Presentence Investigation Report, hereinafter, "PSIR," 4-5, attached Exhibit A.

Defendant appeared for sentencing on September 10, 2010. At that time, the trial court brought up that under MCLA 750.520b(2)(c), Defendant was facing mandatory life without parole. Plaintiff agreed. This was the first time during the proceedings that the 2006 amendment mandating life without parole was mentioned. Trial counsel objected based on lack of notice. Sentencing Transcript, 9/10/10, hereinafter, "STI," 27. The sentencing was adjourned until September 27, 2010.

At the adjourned sentencing, trial counsel argued that all parties were operating under the assumption that Defendant would be scored under the guidelines. Sentencing Transcript, 9/27/10, hereinafter, "STII," 5. The trial court cited *People v Eason*, 385 Mich 228 (1990), and sentenced Defendant to life without parole as mandated by MCL 750.520b(2)(c) .

Defendant appealed his conviction and sentence and filed a motion to remand with the Court of Appeals on May 16, 2011. On June 21, 2011, the Court of Appeals granted Defendant's motion to remand and ordered the trial court to conduct an evidentiary hearing regarding ineffective assistance of counsel. See attached Order of 6/21/2011, Exhibit B.

On July 21, 2011, the trial court conducted an evidentiary hearing regarding ineffective assistance of counsel. Trial counsel Dan Hartman, testified that he first learned of the 2006 amendment regarding life without parole at the first sentencing hearing. Evidentiary Hearing Transcript, hereinafter, "ET," 26. Mr. Hartman testified that he felt that he had some control over Defendant whom he described as very passive. ET, 36. Mr. Hartman said that he believed Defendant would have accepted whatever advice he was given. *Id.* Mr. Hartman testified that on August 9, 2010, on the morning of trial, Defendant was willing to plead *no contest* to three counts of Criminal Sexual Conduct third degree. ET, 70. Finally, Mr. Harman admitted that throughout the entire pretrial process as well as through the trial and sentencing, Defendant maintained his innocence. ET, 68.

Mr. Hartman also explained that he discussed the habitual offender withDefendant as well as the fact that sex offenders are much less likely to get out on their earliest parole date as other offenders. "I always tell my client that they will come very close to maxing out. And it is more important to decrease the maximum, than to worry about the minimum." ET, 76.

On July 27, 2010, the Trial Court gave an oral opinion. First, the trial court found that trial counsel's performance was "objectively unreasonable in light of prevailing professional norms." JT, 14-15. The trial court then turned to whether there is a "reasonable probability" that but for the mistake, the outcome would have been different and determined that regardless, the defendant would not have pled guilty. ET, 16. The trial court filed an Addendum to its Opinion on July 21, 2011, adding that the defendant's claim of innocence throughout the proceedings was further reason why Defendant was unlikely to accept the plea.

The Court of Appeals then addressed Defendant's appeal and affirmed the conviction and sentence. See attached Court of Appeals Opinion, 9/25/2012, Exhibit C. The Court of Appeals held that the record, as well as the evidence presented at the *Ginther* hearing, supported the finding of the trial judge.

Defendant then filed an application for leave to appeal with this Court. For the first time during the proceedings, Defendant spoke through an affidavit stating that he would have entered a guilty plea if he had been correctly advised. Affidavit of Alan Starr Trowbridge, attached Exhibit D.

The decision was held in abeyance pending the decision in *Burt v Titlow*, 571 US ____; 134 S.Ct. 10, (2013). By order of this court issued October 3, 2014, the application is again being considered with special attention to the Court of Appeals opinion in light of *People v Douglas*, 496 Mich 557 (2014).

Additional facts may be set forth as they related to the issues presented.

ARGUMENT

I. DEFENDANT WAS NOT DENIED DUE PROCESS WHERE TRIAL COUNSEL WAS INEFFECTIVE IN EXPLAINING THE POSSIBLE PENALTY BUT COUNSEL'S ERROR DID NOT LEAD TO A REASONABLE PROBABILITY THAT DEFENDANT WOULD HAVE PLED GUILTY.

Standard of Review: In order to successfully argue ineffective assistance of counsel, Defendant must show that counsel's performance was constitutionally deficient and that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that counsel's errors prejudiced the outcome of the case. *People v Pickens*, 446 Mich 298, 318 (1994); *Strickland v Washington*, 466 US 668, 687, 104 SCt 2052,(1984). To prove deficient performance, Defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id* at 687-688. To show that counsel's errors prejudiced the outcome, Defendant must show a reasonable probability that but for counsel's errors, the outcome would have been different. *Id* at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.*

This analysis also applies to counsel's advice given during the plea negotiation process. *Hill v Lockhart*, 474 US 52, 58, 106 S.Ct. 366, (1985). The defendant bears the

burden of establishing that he suffered prejudice. *People v Hoag*, 460 Mich 1, 6 (1999). A defendant whose argument centers on allegedly ineffective advice at the plea stage must show that but for counsel's ineffectiveness there is a reasonable probability that he would have pleaded guilty. *Lafler v Cooper,* 132 SCt 1376, 1385 (2012); *People v Douglas*, 496 Mich 557, 591 (2014).

A reasonable probability must be demonstrated by more than a mere claim by Defendant that he would have taken the plea. There must be some objective evidence that Defendant's decision would have been different. *Id* at 548-549.

People v Douglas, 496 Mich 557 (2014), mentioned in the October 3, 2014 order, is strikingly similar to the instant case. In *Douglas*, neither trial counsel, the prosecution nor the trial court were aware that the defendant was subject to a 25-year mandatory minimum for a CSC I conviction. A *Ginther* hearing was held, the defendant's request to have the pretrial offer reinstated was denied, and the prosecutor's motion for resentencing was granted. *Id* at 592. Similarly to the opinion rendered by the trial court here, the court in *Douglas* reasoned that the difference in the maximum sentence made little difference in light of the defendant's claims of innocence. 593. In *Douglas*, the defendant maintained his innocence throughout the proceedings and here, Defendant's only offer to plead to anything was a *no contest* plea that would not have been accepted by the Court. The defendant in *Douglas* was unwilling to admit to "disgusting and offensive" behavior that he claimed he would never take part in. Similarly, Defendant maintained his innocence throughout the proceedings. Only after his conviction and sentence, does

Defendant look back and state in a self-serving affidavit that he would have pled guilty.In the defendant's description of the offense, which was included in the presentence investigation report, Defendant stated,

> Furthermore, I realize that truth does not matter to people. From testimony to testimony, I heard only suggestion after suggestion. I gave alabies.(sic) We gave dates, times. Everything. In the end, only lies and deceit were against me. People say "Innocent till proven guilty." But one thing you learn as a convicted sex offender, you learn you are guilty until proven innocent. And everyone knows, you cant (sic) prove innocence, only guilt. It is my personal belief that this was a complete witch hunt. Its (sic) easier to blame someone who made a mistake in their past, than to actually strive to find the truth. PSIR, 4-5.

Defendant argues that trial counsel testified that Defendant would have taken any offer he recommended, except to plead to the first offense. However, at no time was Defendant willing to plead *guilty* to anything.

It is also important to note, as the trial court did in its opinion following the *Ginther* hearing, that Defendant knew that he was looking at a life sentence as a habitual offender. While the guidelines did not score life without parole, Defendant knew the trial court could exceed the guidelines. Defendant rejected an offer to plead to two counts of Criminal Sexual Conduct third offense, habitual second, a 22.5 year maximum.

Appellate counsel cites *People v McCauley*, No. 281197 Mich.App. 1/29/2010) and argues that just as the case there was remanded for sentencing, so should Defendant's. *McCauley*, however, can be distinguished, because in that case, the defendant mistakenly believed that he had a valid defense. McCauley did not understand that he could be convicted of murder even if it was proven that he did not fire the shot that killed. Trial counsel failed to explain the theory of aiding and abetting. *Id* at 2. In the

instant case, Defendant was advised by his attorney as well as the trial court that he was facing life or any term of years. Unlike the defendant in *McCauley*, there was nothing about trial counsel's advice that misled Defendant regarding his chances at trial. Mr. Hartman testified at the *Ginther* hearing, "We knew that a jury would not acquit a registered sex offender unless our proofs went in perfectly. I believe our prospects at trial, as I told him, were an extreme long shot. We were talking three to five percent. I mean it was – it was mission impossible. ET, 62.

CONLUSION AND RELIEF REQUESTED

Defendant failed to show a reasonable probability that with sound advice he would have pled guilty. Plaintiff respectfully requests that this Court deny Defendant's application.

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Dated: October 29, 2014

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